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No. 89-1290

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT R. FREEMAN, *et al.*,
Petitioners,

v.

WILLIE EUGENE PITTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a formerly *de jure* dual school district, which achieved effective desegregation in student assignments in 1969 by closing its black-only schools and adopting a court-ordered neighborhood school plan, which it has faithfully adhered to, is nevertheless obligated to remedy the segregative effect of massive demographic changes that occurred over the past 22 years and that were completely beyond the school district's control.

2. Whether a school district operating under a 22 year old desegregation decree is barred from obtaining release from federal court supervision of student assignment policies solely because other aspects of the school district's operations, such as faculty assignments, have not simultaneously achieved and maintained racial balance for a period of three years.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
Pre-Litigation Action By DCSS	2
The Implementation of the 1969 Desegregation Plan	3
Shifts In Residential Housing Patterns	5
Judicial Response to Changing Demographics (1975-86)	7
The 1986 Motion to Dismiss	13
The Eleventh Circuit Decision	18
SUMMARY OF ARGUMENT	19
ARGUMENT	23
THE COURT OF APPEALS ERRED IN ORDERING PETITIONERS TO REMEDY RACIAL IMBALANCE IN STUDENT ASSIGNMENT CAUSED SOLELY BY DEMOGRAPHIC CHANGES BEYOND THE CONTROL OF PETITIONERS	23
A. Federal Judicial Authority To Remedy Racial Imbalance In Any Facet Of School Operations Must Be Causally Linked To The Prior Unconstitutional Conduct Of The Relevant State Actors	24

TABLE OF CONTENTS—Continued

Page

B. The Court Below Erred In Ordering Petitioners To Undertake Massive Additional Efforts To Obtain Racial Balance In Student Assignment When Existing Imbalances Could Not Be Attributed To Petitioners' Prior Unconstitutional Conduct Or Subsequent Acts 28

C. The Theories Advanced By The Eleventh Circuit Provide No Support For Extending Federal Judicial Supervision Over Student Assignment In DCSS Once Racial Imbalance Attributable To State Action Has Been Eliminated 37

CONCLUSION 47

TABLE OF AUTHORITIES

CASES

Page

Armour v. *Nix*, 448 U.S. 908 (1980) 12
Board of Educ. of Oklahoma City v. *Dowell*, 111 S. Ct. 630 (1991) 20, 27, 29, 42, 46
Brown v. *Board of Educ.*, 349 U.S. 294 (1955) 24, 27, 31
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977) 25
Dayton Bd. of Educ. v. *Brinkman*, 443 U.S. 526 (1979) 30
Estes v. *Dallas NAACP*, 444 U.S. 437 (1980) ... 35
Flax v. *Potts*, 915 F.2d 155 (5th Cir. 1990) 40, 41
Green v. *County School Bd.*, 391 U.S. 430 (1968) *passim*
Keyes v. *School Dist. No. 1, Denver, Colo.*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 951 (1991) 40
Keyes v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) 38
Milliken v. *Bradley*, 418 U.S. 717 (1974) 19, 24, 25
Milliken v. *Bradley*, 433 U.S. 267 (1977) ..... *passim*
Morgan v. *Nucci*, 831 F.2d 313 (1st Cir. 1987) 40
Pasadena City Bd. of Educ. v. *Spangler*, 427 U.S. 424 (1976) ..... *passim*
Pitts v. *Cherry*, 598 F.2d 1005 (5th Cir. 1979) 10
Pitts v. *Freeman*, 755 F.2d 1423 (11th Cir. 1985) .. 13
Price v. *Denison Indep. School Dist.*, 694 F.2d 334 (5th Cir. 1982) 30
Raney v. *Board of Educ. of Gould School Dist.*, 391 U.S. 443 (1968) 4, 30
Ross v. *Houston Indep. School Dist.*, 699 F.2d 218 (5th Cir. 1983) 47
Singleton v. *Jackson Mun. Separate School Dist.*, 419 F.2d 1211 (5th Cir.), *vacated*, 396 U.S. 226 (1969), *rev'd*, 396 U.S. 290 (1970) 16
Swann v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1970) ..... *passim*
United States v. *Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967) 4

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Overton*, 834 F.2d 1171 (5th Cir. 1987)	27, 39, 40, 41
United States v. *Wilcox County Bd. of Educ.*, 494 F.2d 575 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974)	16
Washington v. *Davis*, 426 U.S. 229 (1976)	30
Youngblood v. *Board of Pub. Instruction*, 448 F.2d 770 (5th Cir. 1971)	41
STATUTES	
28 U.S.C. § 1254(1)	1
1945 Ga. Laws 398, *repealed by*, 1985 Ga. Laws 1657	2
U.S. Const. amend. XIV	2

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 887 F.2d 1438 (11th Cir. 1989). The district court's memorandum opinion and order of June 30, 1988 (Pet. App. 25a-72a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on October 11, 1989. Pet. App. 1a-24a. Rehearing was denied on November 13, 1989. Pet. App. 83a-84a. The petition for a writ of certiorari was granted on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT

DeKalb County, Georgia is a predominantly urban and suburban region adjacent to Atlanta with a population of more than 450,000. Pet. App. 38a.[1] The DeKalb County School System ("DCSS") is the largest school system in the State of Georgia, serving almost 80,000 students in more than 90 schools. Pet. App. 3a.[2] Prior to the 1966-67 school year, the DCSS, pursuant to state law requirements had maintained separate and overlapping attendance areas for black students and white students. Tr. Vol. V, p. 162.[3]

Pre-Litigation Action By DCSS: Beginning with the 1966-67 school year, the DCSS—prior to the initiation of any litigation—replaced its race-based school attendance zones with a system of geographic attendance zones in which every student, regardless of race, was assigned to

[1] A map of DeKalb County and the surrounding area has been provided for the convenience of the Court. See App. *infra* 1a. The DCSS serves all students residing in DeKalb County except for those living within the Atlanta and Decatur city limits.

[2] The most recent data available to the parties, as of September, 1990, show that the student population is comprised of 61% black students. Hispanic and Oriental students comprise an additional 7% of the student population.

[3] Until it was amended in 1976, Article VIII, Section 1, Paragraph 1 of the Georgia Constitution of 1945 expressly provided that "[s]eparate schools shall be provided for the white and colored races." State statutes also mandated racial segregation in education. See 1945 Ga. Laws 398, *repealed by*, 1985 Ga. Laws 1657 ("Colored and white children shall not attend the same schools").

a single neighborhood school. Every student also was given a "freedom of choice" transfer option, which permitted the student to transfer to any school in the county. Tr. Vol. V., p. 162. Although this system resulted in significant numbers of black children attending formerly *de jure* white schools,[4] it had "no significant impact on the former *de jure* black schools." Pet. App. 33a.

The Implementation of the 1969 Desegregation Plan: On May 28, 1968, this Court announced its decision in *Green* v. *County School Bd.*, 391 U.S. 430 (1968), holding that adoption of a "freedom-of-choice" student assignment plan which failed to eliminate the effects of the dual school system did not satisfy a school board's obligation to remedy state-imposed segregation. On the heels of that decision, respondents filed this action on behalf of all black school children in the District, alleging that the DCSS operated an illegally segregated school system. Pet. App. 26a; see *Pitts* v. *Cherry*, Complaint, No. 11946, at ¶ 9-10 (N.D. Ga. July 5, 1968), J.A. 44. In response, the DCSS immediately and "voluntarily undertook to work with the Department of Health, Education and Welfare (HEW), to develop a . . . plan of desegregation." Pet. App. 26a; J.A. 61. On June 12, 1969, less than one year after the filing of the complaint, after full briefing and hearings, the District Court, with the agreement of all parties, entered an order designed "to be a final and 'terminal,' plan of desegregation." Pet. App. 73a; see J.A. 61.

With respect to student assignment, the district court followed the geographic zoning approach urged by the

[4] In the 1968-69 school year, DCSS voluntarily closed one of its two previously *de jure* black high schools and reassigned those students to the formerly all white schools in their neighborhoods. Tr. Vol. I, p. 131. Thus, in that school year, 37 percent of DCSS's black elementary students were attending previously *de jure* white elementary schools and 69 percent of the black high school students were attending previously *de jure* white high schools. Def. Ex. 193.

plaintiffs and HEW and suggested by this Court's decisions in *Green*, 391 U.S. at 442 n.6 and *Raney* v. *Board of Educ. of Gould School Dist.*, 391 U.S. 443, 448 (1968). The order included three crucial provisions: (1) all the *de jure* black schools from the old dual system were closed; (2) the system of neighborhood attendance zones which had been recommended by HEW was created; and (3) the "freedom of choice" system was abolished and replaced by a strict neighborhood attendance policy designed to prevent white school children from avoiding desegregation by attending schools outside of their home school zones. Thus, far from adopting a "step at a time" plan, *cf. Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 435 (1976), the 1969 order directed the DCSS immediately to desegregate all grades, "including kindergarten," and to assure that pupils be "assigned to schools in these grades without regard to race or color." Pet. App. 77a-78a.[5]

The district court's order was implemented without opposition. Only two of the 92 schools which opened after implementation of the 1969 order had majority black student populations, and there is "no evidence that these

[5] The 1969 order addressed all areas of school operations, including student assignment; school construction; faculty and staff hiring, assignment and dismissal; services, facilities, activities and programs; reporting requirements; and school equalization. Pet. App. 77a-82a; J.A. 64-70. In fact, much of that order was taken from a "form" desegregation order in *United States* v. *Jefferson County Bd. of Educ.*, 380 F.2d 385, 390-96 (5th Cir. 1967) (*en banc*), *cert. denied*, 389 U.S. 840 (1967). Because of the wholesale adoption of the *Jefferson* form order, some of the provisions of the 1969 order bore no relation to the DCSS. For example, the section entitled "School Equalization," (Pet. App. 81a-82a; J.A. 69), refers to "Inferior Schools," which are identified as "schools heretofore maintained for Negro Students." This provision of the form order, designed to remedy conditions in "holdover" or "remaining" one-race black schools (see *Jefferson*, 380 F.2d at 393-94), was irrelevant because the DCSS had closed *all* one-race black schools.

schools [were] a vestige of the dual system." Pet. App. 36a; Def. Ex. 193.[6] Following implementation of the order, the district court retained jurisdiction of the case and no appeal was taken.

This school assignment remedy—closing the *de jure* black schools and adopting a strict neighborhood student assignment system—was appropriate and available to the district court because the DCSS in 1969 was a large school district with 98 schools and with a relatively small black student population. Def. Ex. 193. Moreover, the black students were geographically dispersed throughout the district and could readily be accommodated in the former white schools. The sweep of the district court's remedy permitted the DeKalb School District to avoid the intractable problem of "holdover" *de jure* black schools, which white students would have been reluctant to attend, that plagued many other districts in the South in their attempts to desegregate.

Shifts In Residential Housing Patterns: In 1955, the DCSS had 30,019 students, of whom 2,781, or 9.26 percent, were black. Def. Ex. 193. Although the DCSS's

[6] As of 1969, the overall student population in the DCSS was 94.4% white and 5.6% black. J.A. 62. Fifty-nine DCSS schools opened in the fall of 1969 with less than 3% black student populations, 8 with 3-7%, 5 with 7-11%, 5 with 11-15%, 7 with 15-20%, 2 with 20-25%, 3 with 25-30%, and 1 with 30-35%. Def. Ex. 193. Stoneview Elementary and Terry Mill Elementary opened with 53% and 76% black student populations respectively. Pet. App. 36a-37a.

Terry Mill was located in the westernmost part of the district adjacent to the City of Atlanta and was the first of the formerly *de jure* white schools to experience racial transition. During the 1968-69 school year, the student population was approximately 50% white and 50% black. Pet. App. 36a-37a. Stoneview was in a stably integrated, more rural area in the southeastern part of the district and remained racially balanced thereafter. For most of the period between 1969 and 1986, Stoneview had a majority white population (Def. Ex. 193); "in the 1986-87 school year, according to plaintiffs' evidence," the student population of the school was 53% black. Pet. App. 37a.

black student population has increased every year since 1955, the district also experienced significant growth in its white population between 1955 and 1965, resulting in a doubling of the total student population to 71,577 in 1965, of which black students comprised 4.77 percent. Throughout the 1950's and 1960's, the relatively small black population within the DCSS attendance area was generally dispersed. "In 1970, there were 7,615 non-whites living in the northern part of DeKalb County and 11,508 non-whites living in the southern part of the county." Pet. App. 38a; Tr. Vol. I. pp. 38-39.[7]

Beginning in the early 1970's, however, changing demographic patterns caused the white student population of the DCSS to begin to decline relative to the black student population, particularly in the southern part of the County. Among other factors, the southern part of the County experienced a massive influx of black families, largely from the City of Atlanta. "Between 1975 and 1980, approximately 64,000 black citizens moved into southern DeKalb County," while, at the same time, 37,000 white residents of the District moved away. Pet. App. 38a.

The result of this enormous demographic shift was a large concentration of black families in the neighborhoods of southern DeKalb County. This population shift was "one of the largest and most rapid" that petitioners' demographics expert had ever observed. Testimony of William A. V. Clark, Tr. Vol. I, p. 63; see also Tr. Vol. X, p. 41 (respondents' expert's discussion of "tremendous" demographic shifts in this time period). The district

[7] This evidence came from Atlanta Regional Commission data, which at the time was reported in "white" and "non-white" categories. The evidence revealed that during the early seventies, blacks constituted the vast majority of the "non-white" population in the County. William A. V. Clark, Tr. Vol. I, p. 39.

court found that these demographic changes were:

> the result of suburbanization, that is, work opportunities arising in DeKalb County as well as the City of Atlanta, which attracted blacks to DeKalb; the decline in the number of children born to white families during this period while the number of children born to black families did not decrease; blockbusting of formerly white neighborhoods leading to selling and buying of real estate in the DeKalb area on a highly dynamic basis; and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier.

Pet. App. 44a-45a. Based on all of the evidence relating to these demographic changes, the district court found that:

> The rapid population shifts in DeKalb County were not caused by any action on the part of the DCSS. . . . There is no evidence that the school system's previous unconstitutional conduct may have contributed to this [residential] segregation.

Pet. App. 44a-45a. Having presented no contradictory evidence in the district court, respondents conceded this finding in the court of appeals.

Judicial Response to Changing Demographics (1975-86): In 1975, respondents, for the first time since the entry of the desegregation plan, returned to the district court to challenge certain changes in school attendance zones incident to the opening of a new school and the adequacy of petitioners' efforts to reassign staff in accordance with the 1969 order. Pet. App. 26a n.1, see J.A. 71. In addition, the DCSS had acted, without court intervention and in response to the decision in *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 26 (1970), to further racial balance in student assignment by instituting a majority-to-minority transfer ("M-to-M") program. The M-to-M program allowed a student to attend school outside his geographic zone provided he transferred from a school in which his race was in the majority to one

in which his race was in the minority. J.A. 73. In response to this development, respondents, in their 1975 motion, asked the Court to order certain modifications in the operation of the M-to-M program to increase its desegregative effect. Among other things, respondents asked the DCSS to liberalize the M-to-M rules to make more schools available for student transfers and to provide free transportation for M-to-M transfer students. See Order (11/3/76), J.A. 71.

Upon review of respondents' evidence, the district court found it "impossible to determine . . . to what extent changes in the racial composition of the [elementary] schools was affected by changes in the racial composition of the residential areas encompassed by these schools." Order (11/3/76), J.A. 78; see J.A. 79 (high schools). Thus, while the court initially expressed modest concern about the effects of attendance zone changes on the rapid demographic shifts in the southern part of the district, (J.A. 89-91), the court ultimately concluded that "it cannot be said that [DCSS's attendance zone changes] were constitutionally impermissible" and no alteration in the attendance zones was ordered. J.A. 90.

The court also addressed the issue of teacher assignments, finding that the DCSS had "more than complied with" the requirements of the 1969 order. J.A. 84. However, the court ordered petitioners to take further action so that the racial composition of teaching staffs at all schools would be substantially similar to the system-wide ratio. J.A. 86. On the issue of equality of educational opportunity in the DCSS, the court found that DCSS was distributing "reading and math resources, such as specialists and paraprofessionals," to a higher degree in its predominantly black schools than in its predominantly white schools. J.A. 74-75. With respect to other measures of educational opportunity such as "number of library books, average number of years of staff education and experience, and pupil expenditures for staff per individual

school," the court found that there was "no apparent trend of superiority among any group of schools" in the DCSS. J.A. 75.

Finally, the court concluded that it would require petitioners to adopt the "revisions" to the M-to-M program demanded by respondents "so that the program will . . . help[] eliminate the vestiges of a dual school system in DeKalb County," J.A. 84.[8] In order to assist in oversight of the remaining issues, the court appointed a bi-racial committee to oversee "the M-to-M program and . . . proposed attendance zone changes or school site purchases." J.A. 94.

Between 1977 and 1979, the district court dealt with surprisingly few requests for any adjustments in the basic plan, and these requested changes for the most part involved modifications of the M-to-M program, proposed by the parties or the bi-racial committee, or other housekeeping matters. For example, the court, in an order entered January 23, 1977, granted some of respondents' requests to modify the M-to-M program. J.A. 96-97. Several months later, on April 18, 1977, and May 6, 1977, the court issued orders dealing with deadlines for signing up for the M-to-M program and the operation and makeup of the bi-racial committee. J.A. 97-103.

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[8] The court did not identify the "vestiges" to which this passage refers. In fact, the November 3, 1976 order of the district court does not identify anything which can fairly be characterized as a "vestige" of the old dual attendance system in the area of student assignment. Both the respondents and HEW at the time—like respondents in the court of appeals below—had raised the argument that DCSS had an affirmative duty to prevent the emergence of racial imbalance in student populations that was the result of the dramatic demographic changes taking place in the district. In the court below, respondents often referred to this imbalance based upon demographic shifts as the " 'vestige' of resegregated schools." See, *e.g.*, *Brief for Plaintiffs/Appellants*, Nos. 88-8687 & 88-8775 (March 15, 1989, 11th Cir.) at 25. It is possible that this was the "vestige" to which the district court was referring in 1976.

On October 6, 1977, the district court approved, over the bi-racial committee's and respondents' objections, petitioners' proposed attendance zone changes in connection with the expansion of Flat Shoals Elementary School. In so ruling, the court observed:

> The naked fact is that the school population in the entire southern portion of DeKalb County is growing and its racial composition is going black by leaps and bounds. . . . [T]he main interest and emphasis of the black residents in this area is not so much for an exact racial balance as for quality education. By their own testimony they are presently getting quality education. By all accounts, the DeKalb County school system is said to be the best in the state and perhaps one of the best in the nation. This did not just happen. Much credit for the situation must be given . . . to an able and effective school board and school administration who, despite some possible shortcomings, are trying to obey the law.

J.A. 110.

In May, 1978, the district court approved petitioners' proposal to convert Heritage Elementary School to a special education center and to construct eight additional classrooms at Flat Shoals Elementary to relieve overcrowding. See Order (5/23/78), J.A. 126. The court later rejected respondents' request to reconsider its ruling with respect to the Flat Shoals addition. Order (9/6/78), J.A. 131. The court, however, did modify the M-to-M rules to require parents of kindergarten students wishing to have their children participate in the M-to-M program to provide their own transportation. *Id.* at 129-30.[9]

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[9] The court refused petitioners' request to exclude special education students from the M-to-M program, noting that only one special education student had sought to enroll in the program during the previous year. *Id.* at 131. Respondents appealed the ruling relating to transportation of M-to-M transfers at the kindergarten level to the Fifth Circuit, which affirmed the district court. *Pitts* v. *Cherry*, 598 F.2d 1005 (5th Cir. 1979), J.A. 133.

In its May 8, 1979 order, the court denied a motion brought by petitioners, at the request of the bi-racial committee, to respond to the phenomenon of "white flight" by imposing an "antitipping" ceiling of 26% for the M-to-M program. Order (5/8/79), J.A. 150.[10] The court, following a review of the demographic transition that had occurred in the previous ten years, denied the requested modification of the M-to-M program based on the absence of evidence of any "significant tie between the M-to-M program as it presently exists and the rapid racial transition occurring in certain of the county's schools." J.A. 145. Rather, the court reiterated its finding that the racial transition in the schools "appears instead to have resulted from changes in neighborhoods where blacks are moving in and whites are moving out." *Id.*[11]

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[10] Tipping was described as the phenomenon of schools "already in the path of natural integration as a result of housing patterns to 'tip' and become predominantly black schools." Order (5/8/79), J.A. 141. The "tipping point" was defined as the point at which the percentage of black students in a school would accelerate white flight from that school. The bi-racial committee believed that the tipping point for the DCSS was 26 percent—the overall percentage of black children in the system at that time. J.A. 141. Therefore, the bi-racial committee adopted a resolution seeking to amend the M-to-M plan so that "[w]hen a school's student population exceeds 26% black . . ., that school shall not be eligible to receive any additional M-to-M transfers." J.A. 139.

[11] In 1972, a class action was filed seeking inter-district relief in all of the public school systems in the greater metropolitan Atlanta area, including the DCSS. *Armour* v. *Nix* No. 16708 (N.D. Ga.). The plaintiffs in that case contended that "school officials of the defendant counties [including the DCSS] and cities have, in conjunction with other governmental officials, been instrumental in the creation of housing patterns which have, in turn, furthered a condition of segregation in the schools today." *Armour* v. *Nix*, Order (3/2/78), at 2. However, the three-judge court assigned to the *Armour* v. *Nix* case confirmed the uniform findings of the courts below in this case and held that "[t]o the extent that [residential] racial patterns persist, they are currently in existence

In 1984, following the transfer of the *Pitts* v. *Cherry* [12] case from Judge Edenfield to Judge O'Kelley, respondents returned to the district court seeking to enjoin "the DCSS's proposed expansion of predominantly white Redan High School" on the ground that such expansion would have a segregative effect. Pet. App. 8a.[13] Following a hearing on the respondents' preliminary injunction motion, the court ruled that petitioners could proceed with the planned expansion. In the course of its ruling, the district court noted that "[i]n 1969 the DeKalb County School System was converted from a dual to a unitary school system." Order (2/22/84), J.A. 162. Thus, because the proposed addition was an appropriate solution to "a unique problem" and would have the beneficial effect of reopening the school to M-to-M transfers, the court found that "the school board's decision to build

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because of personal preference and economic constraints." Order (9/24/79) at 33. In particular, the court found that:

> the evidence shows that when the factors that influence choice of residence (economic, personal preference, etc.) have so indicated, people will move into any part of metropolitan Atlanta they desire. In the absence of such factors, neither obstruction nor encouragement by government seems to achieve significant results.

Id., at 22. Thus, the court concluded that the DCSS had not engaged in any conduct contributing to residential segregation. Order (9/24/79) at 32. On appeal to this Court, the holding of the three-judge court in *Armour* v. *Nix* was summarily affirmed. See *Armour* v. *Nix*, 448 U.S. 908 (1980).

[12] On August 25, 1983, the case was restyled *Pitts* v. *Freeman* to reflect the identity of existing DCSS officials.

[13] Redan High School had become severely overcrowded. On three occasions the school board had attempted unsuccessfully to secure the approval of the bi-racial committee to construct a new high school to relieve this overcrowding. Because contiguous rezoning of existing schools would have been segregative in effect and would only have been a partial solution to the problem, the DCSS proposed building a new school to house the seventh and eighth grades within the original Redan attendance zone. Order (2/22/84), J.A. 164-65.

the addition to Redan was not motivated by unlawful racial considerations" and "was not unconstitutional." J.A. 168.

On appeal, a panel of the Eleventh Circuit reversed, holding that the district court erred in declaring the DCSS to be unitary without following the established procedure of providing respondents with notice and a hearing on that issue. *Pitts* v. *Freeman*, 755 F.2d 1423 (11th Cir. 1985), J.A. 179. On the precise issue of the proposed Redan expansion, the court of appeals held that it would remand to the district court to "examine the segregative and desegregative effects of the defendants' actions . . . ." J.A. 182. Any inquiry into discriminatory intent "would be appropriate only after a finding of full unitary status." J.A. 179-80. On remand, the district court reaffirmed its previous decision on the ground that "the long term effects of [petitioners'] plan will be to increase desegregation, [while respondents'] plans will increase segregation in the long run." Order (10/31/85), J.A. 199. Respondents did not appeal from this ruling.

The 1986 Motion to Dismiss: On January 16, 1986, petitioners filed a motion in the district court for a declaration that the DCSS had achieved unitary status and for final dismissal of the case. Pet. App. 27a.

Petitioners assumed the burden of showing that they had dismantled the dual system, taken steps necessary to eliminate any lingering effects of that dual system, and avoided any actions tending to reestablish the *de jure* dual system. Respondents did not contest the fact that petitioners had "achieve[d] unitary status" in the areas of physical facilities, transportation or extra-curricular activities (Pet. App. 59a); nor did respondents contest that petitioners had "fulfilled their constitutional obligation" with respect to the hiring and retention of minority professional staff (including faculty and administrators). Pet. App. 48a. Although these issues were not contested, petitioners nevertheless presented evidence and the dis-

trict court made appropriate findings in each of these areas. See, *e.g.*, Pet. App. 49a.

Respondents, however, opposed dismissal on the grounds that petitioners had not fulfilled their obligations with respect to (1) maintaining racial balance in the assignment of students and (2) the assignment and distribution of professional staff. They also contended that dismissal was unwarranted, because petitioners "have racially skewed the provision of . . . educational resources, resulting in unequal educational opportunity for blacks" within the DCSS. Pl. Trial Brief at 19.

Following extensive discovery and a three-week trial, the court found—and the respondents conceded—that with respect to student assignment, "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools of DeKalb County." Pet. App. 33a; see *id.* at 35a (Respondents "concede that this action" of closing the *de jure* black schools and implementing a neighborhood school plan "effectively desegregated the DCSS for a period of time"). Respondents also conceded that the subsequent racial imbalance in certain DCSS schools was "the result of demographic shifts" in the population of the county. *Id.* at 34a.

However, because "there was insufficient evidence presented about how long the school system remained relatively desegregated before demographic changes had the effect of resegregating certain schools," (Pet. App. 37a) the district court was unwilling to conclude that the "dramatic effect [of] the implementation of the June, 1969 order" by itself constituted a complete remedy for student assignment. *Id.* at 46a. Accordingly, the court examined the actions of the DCSS "over the last two decades" to determine whether any of these actions had contributed to the segregated conditions in the school system. Pet. App. 37a.

The court carefully analyzed the question whether the petitioners had done everything they could to "achieve

maximum practical desegregation" of the student population. Pet. App. 44a; see Pet. App. 41a-48a. Although petitioners had not "implement[ed] *all* programs" that were conceived (in hindsight) by respondents' expert to combat resegregation, the court found that DCSS had not "neglected its constitutional duty to eradicate the vestiges of the former dual system." Pet. App. 46a (emphasis added). Rather, the court found that "the segregation that occurred in DeKalb County would have taken place at approximately the same speed whether or not [petitioners] had implemented the desegregative tools described by [respondents]." Pet. App. 46a.[14]

In sum, with respect to student assignment, the district court found that:

> The DCSS has become a system in which the characteristics of the 1954 dual system have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by [petitioners] or their predecessors.

Pet. App. 47a. Thus, the court concluded that petitioners "have fulfilled their constitutional obligations in this area" and the DCSS should be declared unitary with respect to student assignment. *Id.* at 47a-48a, 71a.

With regard to the other factors set forth in *Green* v. *County School Bd.*, 391 U.S. 430 (1968), the district court found that the "DCSS is a unitary system with

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[14] The court specifically found that no conduct by petitioners contributed in any way to the "rapid population shifts" that resulted in the racial imbalance in the schools. Pet. App. 44a-45a. Nor did the court find any evidence that "the actions of the DCSS in any way promoted" or exacerbated the racial imbalance of the schools. Pet. App. 46a. To the contrary, the court found that petitioners had "achieved a degree of success" in maintaining a level of racial balance through the various programs and reforms adopted through the years. *Id.* at 45a-46a. Based on the evidence as a whole, the court concluded that "the DCSS has done everything that was reasonable under the circumstances to achieve maximum practical desegregation in DeKalb County." Pet. App. 44a.

regard to the areas of . . . transportation, physical facilities, and extra-curricular activities." Pet. App. 71a. However, the court stated that existing percentages of minority faculty and staff in certain schools were out of "substantial compliance" with the so-called "*Singleton* requirement" that the ratio of white to black professional staff in the individual schools be the same as the systemwide ratio.[15] Noting that the racial distribution of staff in the DCSS was very close to the 15 percentage point variance the court considered appropriate, and could be brought into compliance with that statistical standard with little effort, the district court ordered the petitioners to reassign faculty to achieve the necessary balance. Pet. App. 58a-59a, 71a.[16]

The district court also noted respondents' evidence that there was a "statistically significant" difference in the distribution of certain of the educational resources. Pet. App. 65a-66a.[17] Although the district court did "not find

[15] In fact, *Singleton* v. *Jackson Mun. Separate School Dist.*, 419 F.2d 1211 (5th Cir.), *vacated*, 396 U.S. 226 (1969), *rev'd*, 396 U.S. 290 (1970) does not require maintaining school staffs within any particular range of racial balance; "rather, it 'contemplates an initial reassignment so that the racial ratio at every school reflects the systemwide ratio, followed by the utilization of a nondiscriminatory hiring, firing and assignment policy thereafter.'" Pet. App. 58a, quoting *United States* v. *Wilcox County Bd. of Educ.*, 494 F.2d 575, 579 n.2 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

[16] Blacks comprised approximately 27% of the faculty for the 1986-87 school years. For that year, six schools had between 40% and 47% black faculties. All of the rest of the schools had between 13% and 40% black faculties. Pet. App. 52a-53a. Since 1969, no DCSS school has had a majority black faculty.

[17] The court referred to evidence that in "type I" schools (which had been majority white over the last decade), expenditures per pupil were $2,833. Pet. App. 70a. In "type II" schools (which have undergone a transition from majority white to majority black over the last decade), expenditures per pupil were $2,540. *Id.* In "type III" schools (which had been majority black over the last decade),

convincing the [respondents'] evidence" that any such imbalance in resources "affect[s] students' learning potential," Pet. App. 67a, it held that a showing of effect on "learning potential" was irrelevant and that a "previous dual system has an additional burden of assuring that any school predominantly attended by minority students is given the same, if not superior, resources." *Id.* Thus, while the court explicitly declined to find that "the DCSS has been negligent in its duties to implement programs to assist black students," *id.* at 69a,[18] it ordered the DCSS to "attempt to equalize per pupil expenditures among the types of schools during the 1988-89 school year." Pet. App. 72a.

Thus, the district court denied the petitioners' motion to dismiss the case in its entirety. Instead, the court held that petitioners would be required to "comply" with the court's specific criteria for faculty assignment and resource allocation before the court would declare that the school system had achieved unitary status with respect to all of the *Green* factors and that the court was therefore divested of jurisdiction. Pet. App. 71a, 72a.[19]

expenditures per pupil were $2,492. *Id.* This "typology" of schools according to their racial characteristics over the past ten years was a creation of respondents' expert; DCSS does not categorize schools according to the racial composition of their student bodies.

[18] The court found that black students new to the DCSS show greater gains on standardized tests after two years in the system than do similar white students, Pet. App. 63a, and that black students in the DCSS score higher on the Scholastic Aptitude Test than the national average for black students, while white students score lower than the national average for white students. Pet. App. 64a.

[19] With respect to the rulings regarding teacher assignments and resource allocation, the petitioners, in reports to the district court dated September 29, 1989 and August 3, 1989, have attempted to demonstrate full compliance with the district court's outstanding orders in these areas. The district court has not, however, issued any ruling in response to these submissions, in light of the pendency of proceedings in this Court.

The Eleventh Circuit Decision: With respect to the student assignment issue, the Eleventh Circuit held that, as a matter of law, the DCSS retained an affirmative responsibility to cure racial imbalance in student assignment—regardless of its cause—until a condition of "unitariness" is achieved in all facets of school operations:

> [A] school system that has not achieved unitary status must take affirmative steps to gain and maintain a desegregated student population. The DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status.

Pet. App. 19a. With regard to the district court's finding that the DCSS had in no way contributed to demographic shifts that resulted in today's racial imbalance in student assignment, the court of appeals did not hold that finding clearly erroneous. Pet. App. at 20a-21a. Instead, the court of appeals expressly rejected the suggestion that it could not "hold [a school system] responsible for segregation not 'caused' by its dual system." Pet. App. 19a.[20]

On the question of whether success in remedying prior *de jure* segregation in various facets of school operations should be measured "incrementally," the Eleventh Circuit held that the district court had erred in "defining"

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[20] According to the Eleventh Circuit, the Board's success in desegregating student assignment in 1969 (and the subsequent "cause" of any trend towards resegregation) simply was irrelevant to the inquiry:

> The fact that the DCSS achieved racial parity in the area of student assignment . . . does not demonstrate that it fulfilled its duties to achieve maximum possible desegregation and to avoid the reestablishment of a dual system.

Pet. App. 20a. Because the "affirmative duty" created by the original violation remained in force until "unitary status" was achieved, the court "reject[ed] the district court's refusal to require the DCSS to eradicate segregation caused by demographic changes." Pet. App. 20a.

and "applying the definition" of "unitary status." Pet. App. 12a-16a. According to the court,

> a school system does not achieve unitary status until it [simultaneously] maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities, and facilities.

Pet. App. 24a. Thus—regardless of whether current conditions with respect to any of those six factors could be attributed to the prior unconstitutional conduct of the DCSS—"a district court can order relief relating to *any* factor until a school system achieves unitary status." *Id.* at 15a (emphasis in original).

SUMMARY OF ARGUMENT

In mandating massive affirmative efforts to eliminate racial imbalance in student assignment resulting solely from shifts in residential housing patterns, the decision below flatly conflicts with established remedial principles articulated in a number of decisions of this Court. The decision below requires the imposition of a remedy not aimed at the effects of any unconstitutional conduct or the effects of any failure by the school district to comply with existing court orders, and, therefore, that remedy is in excess of the court's authority under the Fourteenth Amendment. Accordingly, the judgment below must be vacated.

A. The object of federal remedial orders in the school desegregation context is the elimination of unconstitutional *de jure* dual school systems. *Milliken* v. *Bradley*, 418 U.S. 717, 737 (1974) (*"Milliken I"*). School desegregation remedies must be focused on those conditions or aspects of school operations that offend the Constitution; thus, any remedy directed to a condition that does not violate the Constitution or does not flow from such a violation exceeds appropriate limits. *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977) (*"Milliken II"*); *Pasadena*

City Bd. of Educ. v. *Spangler*, 427 U.S. 424, 436 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1970). Such "limits" on remedial orders are "tied to the necessity of establishing that school authorities have in some manner caused" the condition that is the subject of the federal court's order. See *Spangler*, 427 U.S. at 434.

The limits on federal injunctive authority in this context reflect fundamental principles of federalism. "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." See *Swann*, 402 U.S. at 16. Although the federal courts possess authority to administer even the minutiae of local school operations where necessary to ensure compliance with the Fourteenth Amendment, in circumstances—such as those here—where a comprehensive remedy disestablishing the dual system has been implemented in good faith over many years, courts must accept the fundamental premise of federalism that primary responsibility for the operation of the schools rests with local authorities. See *Board of Educ. of Oklahoma City* v. *Dowell*, 111 S. Ct. 630, 637 (1991).

B. Under the remedial framework established by prior decisions of this Court, a school district that already has implemented an effective plan to disestablish the former *de jure* dual school system may be ordered to undertake further affirmative relief only in limited circumstances. Further relief would be warranted to correct a condition of racial imbalance to the extent that such imbalance is a "vestige" of prior unconstitutional segregation. *Swann*, 402 U.S. at 15. Moreover, further relief may be appropriate to remedy conditions attributable either to additional intentionally segregative conduct on the part of the school board or to the refusal of the school board to comply in good faith with the orders of the district court.

In this case, the petitioners in 1969 eliminated all *de jure* black schools and instituted a strict neighborhood attendance policy, in compliance with the desegregation plan sought by respondents and HEW. Pet. App. 77a. The district court found and the respondents conceded that with respect to student assignment, "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools of DeKalb County." Pet. App. 33a, 35a. The court also found and respondents also conceded that subsequent racial imbalance in student assignment was attributable solely to shifts in residential housing patterns beyond the control of petitioners. *Id.* at 33a-34a. There is absolutely no basis for concluding that current racial imbalance in student assignment—or in any other aspect of school operations—is attributable to the "prior unconstitutional acts of the defendants." Pet. App. 36a-37a.

Moreover, the district court found that petitioners had complied in good faith with the court's orders and had undertaken voluntary efforts to "combat the shifting demographics" of the County over the years. Pet. App. 39a. Indeed, the court concluded that "the DCSS has done everything that was reasonable under the circumstances to achieve maximum practical desegregation in DeKalb County." Pet. App. 44a. The fact that the respondents themselves took little or no initiative to insist on additional remedial efforts, Pet. App. 32a, strongly supports the conclusion that the DCSS has been operated in good faith and in a manner consistent with the Constitution since implementation of the original decree in 1969. Thus, application of well-established principles of injunctive relief to the undisputed facts in this case demonstrates that the court of appeals' order of additional massive relief in the area of student assignment cannot be supported.

C. The court below offered two novel rationales in support of its order of additional relief in this case. First, the court held that petitioners had an affirmative duty

to eliminate racial imbalance in student assignment, regardless of its cause, as part of their obligation to "move toward the maximum practical level of desegregation." See Pet. App. 18a-19a. Second, the court held that, as a matter of law, any racial imbalance in student assignment must be treated as a "vestige" of the prior *de jure* dual system until such time as the school system achieves "unitary status" on a non-incremental basis—*i.e.*, until it simultaneously "maintains at least three years of racial equality" in six categories (Pet. App. 15a-16a, 18a, 24a)—regardless of the effects of prior remedial orders or intervening "factors for which the defendants could not be considered responsible." *Spangler*, 427 U.S. at 434. Neither theory can be reconciled with this Court's prior holdings.

The error in the court of appeals' "affirmative duty" theory is embodied in that court's rejection of the principle that a federal court cannot "hold [a school system] responsible for segregation not 'caused' by its dual system." Pet. App. 19a. This Court has made clear that a finding of a causal link between a constitutional violation and the condition to be "remedied" is a necessary precedent to an order of affirmative relief. *Milliken II*, 433 U.S. at 282; *Spangler*, 427 U.S. at 434. Because the petitioners have met their "burden . . . to satisfy the court that their [current] racial composition is not the result of present or past discriminatory action on their part," current racial imbalance in student assignment is not a "vestige" of the *de jure* dual system, and the court below lacked authority to order additional affirmative relief. See *Swann*, 402 U.S. at 26.

The court's second rationale, based on its requirement of a finding of "non-incremental" unitariness, is inconsistent with this Court's reasoning in *Spangler* that the failure of a school district "totally [to] achieve[] [a] unitary system" in all aspects of school operations did not "undercut" the school district's elimination of the former

dual system with respect to student assignment. *Spangler*, 427 U.S. at 436. In *Spangler*—as in this case—the good faith implementation of a court-approved "plan designed to obtain racial neutrality in the attendance of students" was sufficient to support the conclusion that the district court "had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 436-37. By foreclosing further court intervention in student assignment—despite the absence of system-wide "unitary status"—this Court in *Spangler* rejected the "overall unitariness" approach adopted by the Eleventh Circuit below. *Id.* at 436; see *Swann*, 402 U.S. at 31-32. Because the court of appeals has ordered affirmative equitable relief in circumstances where there is no constitutional basis for such an order, the judgment of that court must be set aside.

ARGUMENT

THE COURT OF APPEALS ERRED IN ORDERING PETITIONERS TO REMEDY RACIAL IMBALANCE IN STUDENT ASSIGNMENT CAUSED SOLELY BY DEMOGRAPHIC CHANGES BEYOND THE CONTROL OF PETITIONERS

Petitioners are not asking this Court for an immediate declaration of "unitary status" and dissolution of the district court supervision under which they have been operating for the last 22 years. Rather, petitioners seek relief from an extraordinary order of the court of appeals mandating massive affirmative relief in student assignment—such as "pairing and clustering of schools, drastic gerrymandering of school zones" and busing (Pet. App. 23a)—designed "to eradicate segregation caused by demographic changes." Pet. App. 20a.

The Eleventh Circuit offers two separate bases for its decision: (1) the DCSS was obligated to do more to counteract shifts in housing patterns which had caused

racial imbalance in order to fulfill its mandate to "move toward the maximum practical level of desegregation" (Pet. App. 18a); and (2) the system's prior success in desegregating student assignment is irrelevant because "unitary status" cannot be achieved on an incremental basis. Pet. App. 15a-16a. However, both of these rationales are wholly inconsistent with this Court's prior decisions in this area and fundamentally at odds with clear limits on the scope of a federal court's equity power. Accordingly, neither rationale properly supports the holding of the court of appeals, and the judgment below must be vacated.

A. Federal Judicial Authority To Remedy Racial Imbalance In Any Facet Of School Operations Must Be Causally Linked To The Prior Unconstitutional Conduct Of The Relevant State Actors

Any rule that defines the limits of federal authority to remedy *de jure* segregation in local school board operations must correspond to the circumstances that gave rise to such authority in the first instance. In the school desegregation context, "[t]he target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils." *Milliken* v. *Bradley*, 418 U.S. 717, 737 (1974) (*"Milliken I"*). Although hundreds of local school systems have been placed under federal judicial supervision to reverse their prior "dual" status, each system presents distinct problems and conditions. *Brown* v. *Board of Educ.*, 349 U.S. 294, 298 (1955) (*"Brown"*); *Green* v. *County School Bd.*, 391 U.S. 430, 436-37 (1968). The common denominator in the framing of remedial authority is the need to "correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1970).

In formulating an appropriate remedy then, "the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16; see *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (*"Milliken II"*). "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken II*, 433 U.S. at 282; see *Spangler*, 427 U.S. 424 (1976); *Milliken I*, 418 U.S. at 746; *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (desegregation remedy must focus on the "incremental segregative effect" of specific constitutional violation).

Despite the undeniable importance of "eliminat[ing] from the public schools all vestiges of state-imposed segregation," the use of federal judicial power to achieve that objective necessarily is constrained by the limits of the Fourteenth Amendment itself. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1970). Where remedial orders have gone beyond what is necessary to remedy a condition actually caused by a school board's prior unconstitutional conduct, such orders have been struck down. For example, in *Milliken I*, 418 U.S. 717, this Court held that findings of *de jure* segregated conditions within the Detroit School District could not justify an interdistrict remedy that mandated racial balance in school assignment not only within the Detroit School District itself but also within numerous outlying school districts as well. Because the interdistrict remedy "was based upon an erroneous standard"—*viz*, an effort to obtain a particular degree of racial balance (*id.* at 752)—and "was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit," the remedy was held to be beyond a federal court's authority under the Fourteenth Amendment. *Id.*

Similarly, in *Spangler*, this Court held that where an earlier remedial order had "established a racially neutral system of student assignment," 427 U.S. at 434, the dis-

trict court "exceeded its authority" in continuing to "require annual readjustment of attendance zones" to maintain racial balance in student assignment. *Id.* at 434-35.[21] According to this Court,

> [n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished . . . .

Spangler, 427 U.S. at 436 (quoting *Swann*, 402 U.S. at 31-32). The Court emphasized that such an order exceeded a federal court's authority because there was no causal link between "a constitutional violation" on the part of defendants and the "judicially order[ed] assignment of students on a racial basis." *Id.* at 434 (quoting *Swann*, 402 U.S. at 28).

Based on these principles, the existence of significant *de facto* segregation caused exclusively by private choices provides no basis for judicial correction for the simple reason that there is no "substantive constitutional right to a particular degree of racial balance or mixing." 427 U.S. at 434 (quoting *Swann*, 402 U.S. at 24). Instead, there must be some basis for attributing the existing condition of "imbalance" either to the *de jure* segregation that was terminated more than 20 years ago, which is inherently unlikely, or to the conduct of the School Board in the interim. Moreover, in analyzing those issues, the Court does not operate in a vacuum. Instead, the Court in *Milliken I* made plain that in examining the proper scope of any remedial order, "the interests of state and local authorities in managing their own affairs, consistent with the Constitution" also must be considered. 433 U.S. at 280-81.

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[21] The district court in *Spangler* "apparently believed it had authority to impose this requirement [of racial balance in student assignment] even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." *Id.* at 434.

A federal court's authority is constrained by core notions of federalism, including the recognition that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems." *Brown*, 349 U.S. at 299 (emphasis added); see *Dowell*, 111 S. Ct. at 637. The need to place reasonable limits upon a federal court's supervision of a school system flows directly from the unquestioned deterrent effect a desegregation order has upon a school board's willingness to undertake new or innovative educational programs. Such deterrence arises from the fact that it is inherently difficult, if not impossible, to predict with certainty the impact of race-neutral educational programs on a school district's racial balance—especially during periods of demographic change. Because any arguably segregative effect caused by a school system operating under a desegregation decree likely will be challenged—with the attendant costs in time and attorneys' fees—the safest course for such a school system is to undertake no changes in its educational programs, even when there is reason to do so.

In sum, limits imposed by Our Federalism require the courts to recognize that they are ill-equipped to perform the functions of a school board and that a school board cannot optimally perform its function of educating children when its every choice is being scrutinized exclusively on the basis of its effect on racial balance within the schools. As the Fifth Circuit recognized in similar circumstances,

> accommodation of federal superintendence and federalism will not tolerate the idea that although the wrong is righted, the magnitude of the past wrong nonetheless justifies perpetuation of a federal order limiting the ambit of a school district's self-governance.

United States v. *Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987). For these reasons, once *de jure* segregation has been disestablished and its effects disappear, federal

courts should not craft new duties designed to perpetuate federal control over the school board's operations. Such "limits" on remedial authority are "tied to the necessity of establishing that school authorities have in some manner *caused* unconstitutional segregation." *Spangler*, 427 U.S. at 434 (emphasis added).[22]

B. The Court Below Erred In Ordering Petitioners To Undertake Massive Additional Efforts To Obtain Racial Balance In Student Assignment When Existing Imbalances Could Not Be Attributed To Petitioners' Prior Unconstitutional Conduct Or Subsequent Acts.

1. Under the decisions of this Court, where the *de jure* dual system has been long disestablished, a school district may only be ordered to undertake further affirmative relief in two circumstances. First, further relief is warranted to correct a condition of racial imbalance where that condition is a "vestige" of prior unconstitutional segregation. See *supra* 24-26, *infra* 37-38. If current racial imbalance is in some way attributable to—*i.e.*, causally linked to—*de jure* segregation, then the school system must take whatever steps are necessary to eliminate such a vestige of segregation. Thus, the Court in *Swann* held that mandatory busing was an appropriate method of eliminating segregation because no less onerous means could assure elimination of the effects of segregated schools. 402 U.S. at 29-31. Similarly, in *Green*, 391 U.S. at 441, when various "voluntary" methods failed to cure the effects of *de jure* segregation, it was appropriate to enter an order requiring mandatory student assignment.

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[22] The rule that limits federal injunctive authority to curing only those "conditions" that have been caused by the prior unconstitutional conduct of the relevant state actor embodies the most fundamental of federalism principles. *Swann*, 402 U.S. at 16 ("[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary").

Second, an order of further relief may be sustained where such relief is necessary to remedy conditions attributable to additional intentionally segregative conduct on the part of the school board or to refusals by the school board to comply in good faith with the court's desegregation orders. See, *e.g.*, *Dowell*, 111 S. Ct. at 638 (court must consider "whether the Board had complied in good faith with the desegregation decree").[23] A board that undertakes actions that reflect an absence of good faith compliance with the requirements of an existing desegregation decree may be required to undertake further remedial efforts necessary to remedy the segregative effects of its non-compliance. At the very least, a district court always is empowered to ensure compliance with its outstanding lawful orders and to remedy the effects of non-compliance.[24]

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[23] In *Dowell*, this Court stated that, in determining whether federal court supervision of a formerly *de jure* dual system may be terminated, the court,

> should address itself to whether the [school board] had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.

111 S. Ct. at 638. The inquiry in the present case is similar—but not identical—to the inquiry in *Dowell*. There, the question was whether the district court's decree should be finally terminated. *Id.* at 638. Here, the question is whether the court of appeals properly expanded the obligations of the existing decree to impose additional burdens. Obviously, if the *Dowell* standard—justifying final dismissal of the action—is satisfied, there would be no basis for increasing the scope of the remedy. However, the converse is not necessarily true: although an absence of good faith compliance might justify continued district court supervision, an absence of "good faith" would not necessarily justify *expansion* of relief. Instead, the lack of good faith compliance with the original decree would justify expansion of that remedy only to the extent necessary to eliminate the incremental segregative effects of the lack of good faith compliance.

[24] Obviously, the district court also is justified in expanding the scope of an existing desegregation order to the extent necessary to

The primary "vestige" of *de jure* segregated school systems has been the "holdover" identifiably "black school." See *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 537-538 (1979). Because these schools were often perceived as inferior in virtually every way, they carried a significant stigma that discouraged white students from attending them, regardless of improvements to physical facilities or staffs. The existence of such "holdover" schools has presented one of the most intractable problems in school desegregation litigation, and district courts understandably have been reluctant to find that such "holdover" schools are not a vestige of the dual system.[25]

The DCSS, by contrast, has had no holdover all-black schools since 1969. In that year, the former *de jure* "black schools" were closed and all black children were integrated into neighborhood schools in accordance with the plan proposed by HEW and the respondents and suggested by this Court's decisions in *Green* v. *County School Bd.*, 391 U.S. 430, 442 n.6 (1968), and *Raney* v. *Board of Educ. of Gould School Dist.*, 391 U.S. 443, 448 (1968). Neither respondents nor the court of appeals has been able to point to a single condition or aspect of operations in the DCSS that is traceable to the *de jure* segregated conditions that existed prior to 1969. In particular, there is no question that current conditions and policies relating to student assignment—which, since 1969, have been subject to judicial supervision—cannot be deemed to be

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eliminate the effects of new intentionally segregative conduct by the school board. See *Spangler*, 427 U.S. at 434; see *Washington* v. *Davis*, 426 U.S. 229 (1976).

[25] The hundreds of school desegregation opinions issued in the courts of the old Fifth Circuit show that the vast majority of student assignment problems have been traceable to the "holdover" black school. See, *e.g.*, *Price* v. *Denison Indep. School Dist.*, 694 F.2d 334, 364-66 (5th Cir. 1982) (listing cases addressing difference between holdover virtually all-white schools and holdover *de jure* black schools in predominantly white school districts).

a "vestige" of the prior *de jure* dual system. See *infra* 32-34.

Moreover, with respect to the issue of whether the DCSS's interim conduct provides any basis for imposing additional affirmative relief, there is no question that the DCSS over the past 22 years consistently has complied in good faith with the district court's orders. See *infra* 35.[26] If the assignment of students to schools—pursuant to the terms of the court's race neutral decree—nevertheless results in some imbalance in the distribution of the races, that is not a condition that offends the Constitution and it provides no basis for imposing additional affirmative duties on the School Board.

This is the essential teaching of *Spangler*, in which this Court held that a school district that had "implemented a racially neutral attendance pattern" and thereby established "a system of determining admission to the public schools on a nonracial basis," *Spangler*, 427 U.S. at 435 quoting *Brown*, 349 U.S. at 300-01), had performed its obligation with regard to remedying "previous racially discriminatory attendance patterns." *Id.* at 437. Absent a "showing" that "changes in the racial mix of some Pasadena schools" that occurred after the racially neutral method of assignment had been established "were in any manner caused by segregative actions chargeable to the defendants," *id.* at 435, the Court concluded that there was no basis for ordering further relief.

In reaching this conclusion, the Court in *Spangler* flatly rejected the very different approach of the dissent. In the dissent's view, the school district, which had formerly imposed *de jure* segregation, properly could be ordered to maintain racial balance in the Pasadena schools until

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[26] The Eleventh Circuit did not suggest that the massive additional remedial efforts in student assignment were justified by any absence of good faith on the part of petitioners. The record would not support such a finding and, in fact, the unchallenged findings of the district court are to the contrary. See Pet. App. 44a-48a.

full "unitary status" was achieved. Thus, the *Spangler* dissent argued that a federal court in a desegregation case was invested with sweeping authority to supervise school systems to promote racial balance—regardless of whether the imbalance could be attributed to any previous segregation by the school board. However, unless this Court is willing to abandon the principles uniformly articulated in its remedial decisions, see *supra* 25-26, in favor of the approach of the *Spangler* dissent, application of those well-established principles of injunctive relief to the undisputed facts in this case demonstrates that the order mandating an additional student assignment remedy cannot be supported.

2. In DeKalb County, assignment of students to schools according to race was terminated in the 1966-67 school year. In 1969, the district court ordered the adoption of a student assignment plan—urged by respondents and by HEW—pursuant to which all former *de jure* black schools were closed and a strict system of neighborhood attendance zones (formulated by HEW) was established. At the time this order was implemented, the residential segregation that is found in the County today simply did not exist, and the order was designed to (and did) ensure that all students immediately be "assigned to [all] grades without regard to race or color." Pet. App. 77a.

Thus, as the court of appeals recognized, the DCSS effectively dismantled the dual school system and "achieved racial parity in the area of student assignment on the day it closed the *de jure* black schools" in 1969. Pet. App. 20a. Only two of the 92 schools which remained open after implementation of the 1969 order had majority black student populations (Def. Ex. 193) and both of those schools had historically been operated as *de jure* white schools. One of the schools, Stoneview Elementary, which is located in a "stable integrated area" (Pet. App. 37a), opened in 1969 with a student body that was 51% black; at the time of the hearing, almost 18 years later,

the racial makeup of that school was virtually unchanged. See Def. Ex. 193 (for most of the period between 1969 and 1986, Stoneview had a majority white student population); Pet. App. 37a (racial mix at Stoneview is 53% black as of 1986-87 school year).

The other school, Terry Mill Elementary School, was undergoing more substantial swings in racial composition due to its location adjacent to the City of Atlanta and shifting demographics at the time of the original desegregation order. In 1967, blacks constituted 23% of the student population of that school; in 1968, blacks constituted 50% of the student population; and, in 1969, the percentage of black students at the school was 76%. Pet. App. 36a. The district court found, however, that there was "no evidence presented that the former dual system in any way contributed to the rapid racial transition of that school." *Id.* Instead, the court concluded, based on the evidence presented, that the shifting racial balance of the student population was attributable solely to rapidly changing demographics in the surrounding neighborhoods. *Id.* ("the area surrounding Terry Mill School was one of the first areas to be [a]ffected by a rapid shift in the minority population"). The district court could find no support for the suggestion that the "high percentage of minority students in Terry Mill School in 1969" was attributable to the "prior unconstitutional acts of the defendants." *Id.* at 37a.

Given the recognized success of the 1969 order in desegregating the student populations in the DCSS, as well as the district court's careful, and undisputed, analysis of the effects of changing residential housing patterns over the years (Pet. App. 33a-48a), there is no basis to conclude that the current imbalance in student assignment—or any other aspect of school operations—is a "vestige" of the former dual school system.[27] To the contrary, any

[27] There is no connection between the failure of the school board to meet the arbitrary *"Singleton"* criteria in all of its schools at

racial imbalance in the DCSS is a product of current housing preferences of private individuals and is in no way attributable to the conduct of the School Board prior to 1969.[28]

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the time of the district court hearing and the *de jure* segregated schools of 1968. It is undisputed that the DCSS has exceeded all requirements with respect to the hiring of minorities in both teaching and administrative positions within the school district and that since 1969 there never has been a school with a majority black faculty. See *supra* 16 & n.16; Pet. App. 48a-49a. To be sure, the School Board at times has permitted some variation from the statistical norm for percentages of minority teachers and administrators at a given school. But it is also clear that this has been caused by the right of teachers with seniority to work closer to their homes and the preferences of parents at schools with black majorities to have black principals. While those excuses do not justify deviations from *Singleton*, as that case is interpreted in the Eleventh Circuit, they certainly eliminate any inference that such statistical imbalances are traceable to times when segregation was mandated by state law.

Similarly, there is no basis for inferring that the disparities in "educational resources" among various "types" of schools has any relationship to past discrimination. In fact, the district court found that this disparity is merely numerical and there is no qualitative difference in education based on race. See *supra* 16-17. Moreover, the data are largely explained by the fact that schools in the southern part of the District tend to be larger as a result of the recent, dynamic growth in that area. See Def. Ex. 193; Tr. Vol. V, pp. 209-10; Vol. VI, pp. 152-54. Large schools have the same fixed costs as small schools—*i.e.*, the same number of principals, band directors, sports teams, etc.—and thus, large schools operate more "efficiently" in terms of per pupil expenditures. Such an imbalance also is attributable to the fact that faculty with more seniority (and higher salaries) tend to assert their right to work in schools closer to their homes. In any case, the finding of the district court in its November 3, 1976 order (see *supra* 8) that there was no evidence of disparity in the availability of resources makes clear that such a "disparity" is in no way traceable to conduct that occurred more than 20 years ago.

As noted previously, petitioners believe that they now have eliminated both of these "disparities." See *supra* n.19. That issue, however, is before the district court.

[28] See *supra* 11. The district court's findings on this point were entirely consistent with the findings of the three-judge court in

In addition, the racial imbalance in the student population of certain schools is unrelated to any conduct of the School Board since 1969. Indeed, the record as a whole demonstrates not just an absence of defiance to the district court's orders, but a longstanding commitment by the DCSS to undertake programs to "combat the shifting demographics" within the County. Pet. App. 39a. The fact that the respondents themselves took little or no initiative to insist on additional remedial efforts over the past 20 years (until petitioners moved to lift the injunction), Pet. App. 32a, is perhaps the best evidence that the DCSS during that period has been operated in good faith and in a manner consistent with the Constitution.

The Eleventh Circuit's holding that the mere presence of racial imbalance in the schools "indicates that vestiges remain" and that the DCSS has not achieved "maximum practical desegregation" in student assignment (Pet. App. 20a, 22a) is wrong and defies well-established remedial principles. That holding simply cannot be sustained unless this Court intends to overrule *Spangler*. Overreaching efforts to obtain through judicial fiat a "perfectly" operated and racially-balanced public school system fail to recognize that such a "solution . . . may be unattainable in the context of the demographic, geographic, and sociological complexities of modern urban communities." *Estes* v. *Dallas NAACP*, 444 U.S. 437, 448 (1980) (Powell, J., dissenting). More important, given the current financial realities of most public school systems, a call for the infusion of massive resources in pursuit of racial balance necessarily must divert such resources from other valid educational goals—many of which are likely to have a more immediate and substantial impact on the quality of

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Armour v. *Nix*, *supra* n.11, which found in 1979 that residential housing patterns in DeKalb County were the result of "personal preference and economic constraints" and that DCSS officials had not engaged in any conduct contributing to residential segregation. Order (9/24/79), at 32-33.

education within the school system. Nevertheless, *if*, in fact, the Constitution commanded such expenditures, petitioners could not, and would not, shirk their responsibilities. But where, as here, petitioners' school assignment practices fully comply with their constitutional obligations, no further relief should be ordered.

It may well have been the expectation of this Court or of the public generally that the landmark constitutional holdings of the 1950's and equitable holdings of the 1960's would in the end lead to racially balanced school systems throughout the nation. Certainly, it was reasonable to hope that race relations would advance to a point that by 1990, school systems would be more meaningfully integrated—at least in statistical terms—than the DCSS is. But the failure to maintain racial balance for its own sake is not a remedial failure. If it is a failure at all, it is a social failure.

It would serve no valid purpose now to attempt to remedy such a social problem by imposing increased burdens on school districts that could not have prevented or influenced the housing preferences that created racial imbalance in the schools. *Swann*, 402 U.S. at 22 ("One vehicle can carry only a limited amount of baggage"). The crucial fact for purposes of this litigation is that there is no *de jure* segregation in DeKalb County today and the School Board certainly has no desire to turn back the clock. To the contrary, the presence of black members on local school boards, such as the two currently on the DCSS's seven-member board, ensures that school district administrators will continue to act without regard to race or face immediate and public condemnation. Contrary to the holding below, the time for—and need for—immediate and drastic federal judicial intervention has long since passed.

C. The Theories Advanced By The Eleventh Circuit Provide No Support For Extending Federal Judicial Supervision Over Student Assignment In DCSS Once Racial Imbalance Attributable To State Action Has Been Eliminated.

The Eleventh Circuit's decision offers two intertwined rationales in support of its order of additional relief in the area of student assignment: (1) the DCSS was obligated to remedy the effects of changing housing patterns as part of its affirmative duty to "move toward the maximum practical level of desegregation" (Pet. App. 18a); and (2) the DCSS's affirmative duty to maintain racial balance in student assignment continued in effect until the DCSS achieved longstanding "unitary status" on an overall (*i.e.*, non-incremental) basis. Pet. App. 15a-16a. Neither theory can be reconciled with this Court's prior holdings.

1. According to the court below, a formerly *de jure* dual school system has an "affirmative duty" to eliminate racial imbalance in student assignment, regardless of its cause. Moreover, the court held that the existence of any racial imbalance in a "non-unitary" system must be deemed as a matter of law to be a "vestige" of prior unconstitutional discrimination until such time as the school system achieves "unitary status" (as defined by the court, see *supra* 35)—regardless of the success of prior desegregation decrees or the effect of intervening "factors for which the defendants could not be considered responsible." *Spangler*, 427 U.S. at 434. As noted previously, *supra* 25-26, 31-32, this Court's prior holdings undermine completely this portion of the court of appeals' analysis.

This Court never has undertaken to delineate all of the conditions which, in a particular case, might be found to constitute a "vestige" of discrimination. However, as a general principle, a "vestige" of discrimination that is subject to further remediation must be an identifiable condition or practice which is fairly traceable to the orig-

inal constitutional violation. See *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977); *Spangler*, 427 U.S. at 434-35. In other words, a finding that a particular condition or facet of school operations is a "vestige" of the dual system must be supported by more than a showing of racial imbalance. See *Spangler*, 427 U.S. at 434.[29]

The Eleventh Circuit's characterization of racial imbalance caused solely by shifting housing patterns as a "vestige" of discrimination (Pet. App. 20a) renders the term "vestige" useless as an analytical tool. In contrast to the careful focus on the nature and scope of the constitutional violation inherent in this Court's remedial decisions from *Swann* to *Spangler*, the decision below concocts a completely artificial standard to determine the scope of a school board's duty in a desegregation case—

[29] A lack of racial balance in the schools cannot be deemed to be a "vestige" of past discrimination where, as here, the school authorities have met their "burden . . . to satisfy the court that their [current] racial composition is not the result of present or past discriminatory action on their part." *Swann*, 402 U.S. at 26; see *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 211 n.17 (1973) (school authorities must "show that current segregation is in no way the result of those past segregative actions"). In *Spangler*, the Court held that once an effective student assignment remedy had been implemented, the plaintiffs bore the burden of proving that "changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to the defendants." 427 U.S. at 437.

The apparent difference in the assignment of the burden of proof between *Keyes* and *Spangler* is explained by the fact that an effective student assignment remedy already had been instituted in *Spangler*, whereas in *Keyes*, there had been no such remedy. Thus, in *Spangler*, the chain of causation, which had been established by the proof of the violation, had been broken by the implementation of the remedy, and the burden of proof shifted back to the plaintiffs. In this case, even though the 1969 remedy concededly was effective in terms of student assignment, petitioners voluntarily came forward with evidence to prove the cause of current racial imbalance in student assignment and petitioners' lack of involvement in, or control over, those causes. See *supra* 13-14.

an affirmative duty to gain and maintain racial balance, regardless of the factors that would tend to give rise to any imbalance.

In the DCSS, the "neutral attendance pattern" required by *Spangler*, 427 U.S. at 437, was established in 1969, and the petitioners' record of continuous good faith compliance is clear. See *supra* 35. There is no evidence that the subsequent racial imbalance in the schools resulted from anything other than demographic changes in District-wide residential patterns. See Pet. App. 34a (respondents "concede that the racial segregation in DeKalb County is the result of demographic shifts"); *supra* 6-7, 14-15.[30] Moreover, those shifts in housing patterns are in no way attributable to any "segregative actions chargeable to defendants." *Cf. Spangler*, 427 U.S. at 437. Yet, the standard adopted by the Eleventh Circuit, with its focus on an expanded "affirmative duty," would require the district court to avoid the result dictated by *Spangler* and to order further drastic relief in student assignment to "eradicate segregation caused by demographic changes." Pet. App. 20a.[31]

[30] In referring to current "segregation" or racial imbalance in student assignment, the district court repeatedly made clear its conclusion—which is undisputed by both the court of appeals and respondents—that the current racial imbalance constituted "de facto segregation (segregation caused by private choice)" Pet. App. 28a, not *de jure* "segregation caused by the intentional segregative acts of the [school district] . . . ." App. at 28a.

[31] The Eleventh Circuit's reliance on racial imbalance caused solely by shifting housing patterns as a basis for mandating additional relief ignores the principle that

> continuing limits [on school board action] imposed as a remedy after the wrong is righted effectively changes the constitutional measure of the wrong itself; it transposes the dictates of the remedy for the dictates of the constitution and, of course, they are not interchangeable.

United States v. Overton, 834 F.2d 1171, 1176 (5th Cir. 1987). Such an expansive notion of a school board's affirmative remedial

At bottom, the fundamental flaw with the Eleventh Circuit's "affirmative duty" analysis is that it eliminates the causation requirement of *Swann*, *Milliken I* and *Spangler* from the remedial stage of school desegregation litigation. See *supra* 25-26. The court below flatly rejected the proposition that the federal courts could not "hold [the DCSS] responsible for segregation not 'caused' by its dual system." Pet. App. 19a.[32] In so holding, the court "exceeded appropriate limits" because it imposed a remedy "aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken II*, 433 U.S. at 282; see also *Spangler*, 427 U.S. 424. Because the theory of "affirmative duty" applied by the court below is fatally flawed, the result reached cannot be sustained and, therefore, the judgment below must be vacated.

2. The Eleventh Circuit also adopted a "per se" test of "overall unitariness" to measure when the implementation of a desegregation plan has been successful and the school district's "affirmative duty" is terminated. Pet. App. 15a-16a.[33] The court held that "a school system

obligations goes beyond the limits of this Court's precedents and embraces the vastly different vision of the federal court's authority embraced in the *Spangler* dissent.

[32] Respondents' concessions that the 1969 order "did, for a time, result in the desegregation of the schools of DeKalb County" and that DCSS in no way "caused" the subsequent racial imbalance were irrelevant to the application of the standard adopted by the Eleventh Circuit. See Pet. App. 20a ("[t]he fact that the DCSS achieved racial parity in the area of student assignment . . . does not demonstrate that it fulfilled its duties to achieve maximum possible desegregation").

[33] The term "incremental unitariness" has been used to describe the standard by which a school district can measure progress towards elimination of a *de jure* segregated school system by achieving a court-ordered goal with respect to each facet of operations (or each *Green* factor)—regardless of whether the goal with respect to every other *Green* factor has yet been achieved. See *Morgan* v. *Nucci*, 831 F.2d 313 (1st Cir. 1987); *Flax* v. *Potts*, 915 F.2d 155, 158-59 (5th Cir. 1990) (achieve unitary status incrementally); *United States* v. *Overton*, 834 F.2d 1171 (5th Cir. 1987) (unitary status achieved in an incremental fashion); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 895 F.2d 659, 666 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 951 (1991) (school district declared unitary in certain respects, even though other respects remain nonunitary). By contrast, under the Eleventh Circuit's requirement of overall unitariness, each facet of school operations must be remedied (and must remain in some form of undefined racial balance over a period of years) before the school district may be released from the obligations of the desegregation decree relating to any one facet of operations.

does not achieve unitary status until it [simultaneously] maintains at least three years of racial equality in six categories: student assignment, faculty, staff, transportation, extracurricular activities, and facilities." Pet. App. 24a; see *id.* at 14a & n.9 (school system must fulfill "all six factors *at the same time* for [three] years").[34] Thus, according to the Eleventh Circuit, a lower court has an unconstrained mandate to order affirmative relief designed to achieve racial balance in all facets of school operations until overall "unitary status," under the terms of this "per se" test, has been achieved. Pet. App. 14a-15a ("a district court can order relief relating to *any* factor until a school system achieves unitary status").[35]

At the outset, the "per se" test adopted by the Eleventh Circuit provides no meaningful guidance in measuring

[34] Citing *Youngblood* v. *Board of Pub. Instruction*, 448 F.2d 770, 771 (5th Cir. 1971). The former Fifth Circuit has since been divided into the Fifth and Eleventh Circuits, and the current Fifth Circuit has expressly rejected the "test" advocated by the court below. *Flax* v. *Potts*, 915 F.2d 155 (5th Cir. 1990); *United States* v. *Overton*, 834 F.2d 1171 (5th Cir. 1987).

[35] "Not until all vestiges of the dual system are eradicated can demographic changes constitute legal cause for racial imbalance in the schools. . . . Notwithstanding the school authorities' apparent good faith attempt to desegregate in 1970, the system has never achieved unitary status. . . . Consequently, the school board . . . is still under an affirmative duty" to order further relief to achieve racial balance in school assignment. Pet. App. 20a, (quotations omitted).

the success of efforts at desegregation of formerly *de jure* dual school systems. This "test" provides no benchmark to determine when the "*Green* factors"—which merely identify various "facets" of school operations (*Dowell*, 111 S. Ct. at 638)—are "fulfilled," to the extent required by the court. Pet. App. 14a. Moreover, although the test calls for racial equality, the court of appeals expressly has instructed that success in achieving such equality in each of the *Green* factors *cannot* be based on "any particular degree of racial balance" or "racial percentages." Pet. App. 21a & n.13.[36] Such an artificial "test" cannot substitute for the necessarily fact-bound analysis of the conditions within the school system, "assessed in light of the circumstances present and the options available in each instance." *Green*, 391 U.S. at 439; see *supra* 13-17. Moreover, by couching the inquiry in the form of a mechanical, yet imprecise, "per se" standard, the Eleventh Circuit's approach is more likely to impede rather than promote progress towards desegregated school systems.[37]

The "per se" test applied by the Eleventh Circuit in this case must be rejected as inconsistent with this Court's prior decisions. In particular, the question of whether a lack of compliance in one facet of school operations may support additional affirmative relief in a separate facet of operations was addressed by this Court in *Spangler*, 427 U.S. at 436-37. As noted *supra* 25-26, 31, the Court in that case found that implementation of the original desegregation plan in the Pasadena Unified School District ("PUSD") had "achieve[d] a system of determining admission to the public schools on a non-

[36] Thus, the court below demanded that an additional remedy be imposed solely to rectify a numerical racial imbalance, while simultaneously forbidding the use of any numerical standard to assess the effectiveness of the remedy in curing the imbalance. Pet. App. 21a-22a.

[37] "[A] school board is entitled to a rather precise statement of its obligations under a desegregation decree," *Dowell*, 111 S. Ct. at 636, but the Eleventh Circuit's "test" provides neither precision nor accuracy in defining the scope of the DCSS's obligations.

racial basis." 427 U.S. at 435 (quoting *Brown*, 349 U.S. at 300-01). Although "changes in the demographics of Pasadena's residential patterns" had resulted in subsequent racial imbalance in the schools (including the evolution of several majority black schools), this Court held that the original plan had achieved the necessary objectives with respect to student assignment and no further "relief" in that area was permissible. *Id.* at 435-36. In so holding, the Court pointed to a passage from the *Swann* opinion, which noted that "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Id.* at 436 (quoting *Swann*, 402 U.S. at 31-32).

The Court's opinion in *Spangler* made clear that the termination of authority over student assignment was final, despite the fact that "petitioners [may] have not yet totally achieved the unitary system contemplated by this quotation from *Swann*." 427 U.S. at 436. Thus, the *Spangler* Court held that the absence of proof that the PUSD had demonstrated "compliance with those portions of the plan specifying procedures for hiring and promoting teachers and administrators . . . does not undercut the force of the principle underlying the quoted language from *Swann*." *Id.* Accordingly, under *Spangler*, the achievement of desegregation in each of the facets of school operations suggested by *Green* should be considered as *discrete* objectives—not as part of an abstract condition or overall "status" of "unitariness."

The Eleventh Circuit rejected the argument that its holding was inconsistent with the decision in *Spangler*, stating that "[i]n *Spangler*, the Court simply refused to approve the Pasadena School Board's rigid requirement that no minority comprise a majority of any school population." Pet. App. 16a. Such a response not only mischaracterizes the plain holding of this Court in *Spangler*

but reflects the focus of the court below on the achievement of an abstract *condition* of "unitariness," rather than on the satisfaction of a number of more specific and measurable operational goals. See Pet. App. 16a ("[a] school system achieves unitary status or it does not").

The court below simply refused to acknowledge what the majority in *Spangler* found to be the "principle" derived from the *Swann* decision—*viz.*, that the failure "totally [to] achieve[] [a] unitary system" did not undermine the PUSD's ability effectively to achieve unitary status (and an end to judicial supervision) with respect to student assignment. *Spangler*, 427 U.S. at 436. In *Spangler*, as in this case, once a court-approved "plan designed to obtain racial neutrality in the attendance of students" in the public schools was successfully implemented, "*that* objective" (*id.* at 436 (emphasis in original)) of the case was completed, and the district court "had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 436-37. By foreclosing further court intervention in student assignment in the PUSD—despite the lack of system-wide "unitary status"—this Court in *Spangler* rejected the "overall unitariness" approach adopted by the Eleventh Circuit below.[38]

Indeed, the "overall unitariness" theory of the Eleventh Circuit is incompatible not only with *Spangler* but also with the "principle[s] underlying" *Swann*, upon which the *Spangler* Court relied. 427 U.S. at 436. Fundamental

[38] The dissent in *Spangler* argued for an approach that is virtually indistinguishable from that adopted by the court of appeals here, asserting broad remedial authority for the district court to adjust school attendance zones until "the goal of a wholly unitary system" had been achieved. 427 U.S. at 443 (Marshall, J., dissenting). The majority observed, however, that the arguments supporting such an approach "have little substance." *Id.* at 438 n.5.

to the Court's analysis in *Swann* is the basic concept that the federal court's remedial authority is exhausted once the condition that creates that authority has been eliminated. Accordingly, if the court effectively desegregated a school system with respect to student assignment, there would be no basis for providing further relief unless the school board intentionally engaged in conduct with a segregative effect in that particular area of school operations. See *supra* 29. School board conduct with an impermissible effect in some other area of operation of the school provides no basis under *Swann* for a court to impose a remedy in the area of student assignments.

The point can be easily illustrated by a simple example. If a school board was found liable in the first instance only for failing to hire sufficient minority faculty members, that would provide no basis for judicial modification of student assignment. The principle should be no different simply because the school district once operated a segregated school system. In either situation, there must be a fair connection between the offending conduct and the remedy ordered by the district court. See *supra* 25-26. Every aspect of a remedial order must be "aimed at eliminating a condition that . . . violate[s] the Constitution or . . . flow[s] from such a violation." *Milliken II*, 433 U.S. at 282. Because the test of "overall unitariness" that was essential to the holding below is fundamentally inconsistent with the decisions of this Court, particularly *Spangler*, the judgment below cannot be sustained.[39]

[39] Even if the two facets of school board operations found by the district court to require additional remediation (*i.e.*, faculty/staff assignment and resource distribution, *supra* 15-17) could be found to have had some impact on student assignment—and there is no finding by the district court that would support such an argument—it would nevertheless be patently overbroad to order massive affirmative relief aimed at the achievement of racial balance in student assignment in response to minor "imbalances" in *other* aspects of school operations. Regardless of whether an "incremental" or "non-incremental" analysis is adopted, *Dayton* makes clear that the remedy must be tailored to the specific violation, and here, the order of the court of appeals is not so tailored.

3. Affirmance of the remedial theories adopted by the Eleventh Circuit would have the practical effect of extending indefinitely federal court oversight of local school board operations. Although the Eleventh Circuit must have believed that ongoing supervision was necessary to achieve its own goals for the DCSS, the decision reflects no recognition that judicial power, stripped of constitutional authority, is unnecessary, intrusive and potentially detrimental to the educational process.[40]

Certainly, perpetual supervision of the school system with its attendant costs in resources and stifled initiatives is not what the Court had in mind when it first sanctioned district court supervision of desegregation plans. *Dowell*, 111 S. Ct. at 637 ("[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination . . . [desegregation decrees] are not intended to operate in perpetuity.") This Court in *Dowell* also noted that:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination . . . ."

Id. An "incremental" approach to achieving the goals of desegregation recognizes the federalism interest in ending court supervision of matters that no longer require oversight, while focusing resources and attention on those facets of operations that require additional remedial action.

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[40] As Judge Edenfield noted in this case in 1977, "[q]uality educational systems are a fragile blessing, as many metropolitan areas have learned to their sorrow. When one is found it should not be harassed out of existence to satisfy fractional technicalities." Order (10/6/77), J.A. 110.

In the present case, the school district effectively eliminated the effects of the prior *de jure* segregated school system on student assignment through implementation of the district court's 1969 order. Racial balance in the schools subsequently shifted not in response to any action of the DCSS but in response to larger demographic changes. Pet. App. at 36a-48a. Those shifts in housing patterns occurred as a result of social and economic factors occurring outside of, and in spite of, the DCSS's continuing good faith compliance with the letter and spirit of its obligations under the decree. Ultimately, the decision below fails to recognize that "school officials who have taken effective action have no affirmative fourteenth-amendment duty to respond to the private actions of those who vote with their feet," *Ross* v. *Houston Indep. School Dist.*, 699 F.2d 218, 225 (5th Cir. 1983). Because the court of appeals has ordered massive affirmative equitable relief when there is no extant constitutional violation to justify that order, the judgment must be set aside and the district court's more circumscribed order upheld.

CONCLUSION

The judgment of the court of appeals should be vacated.

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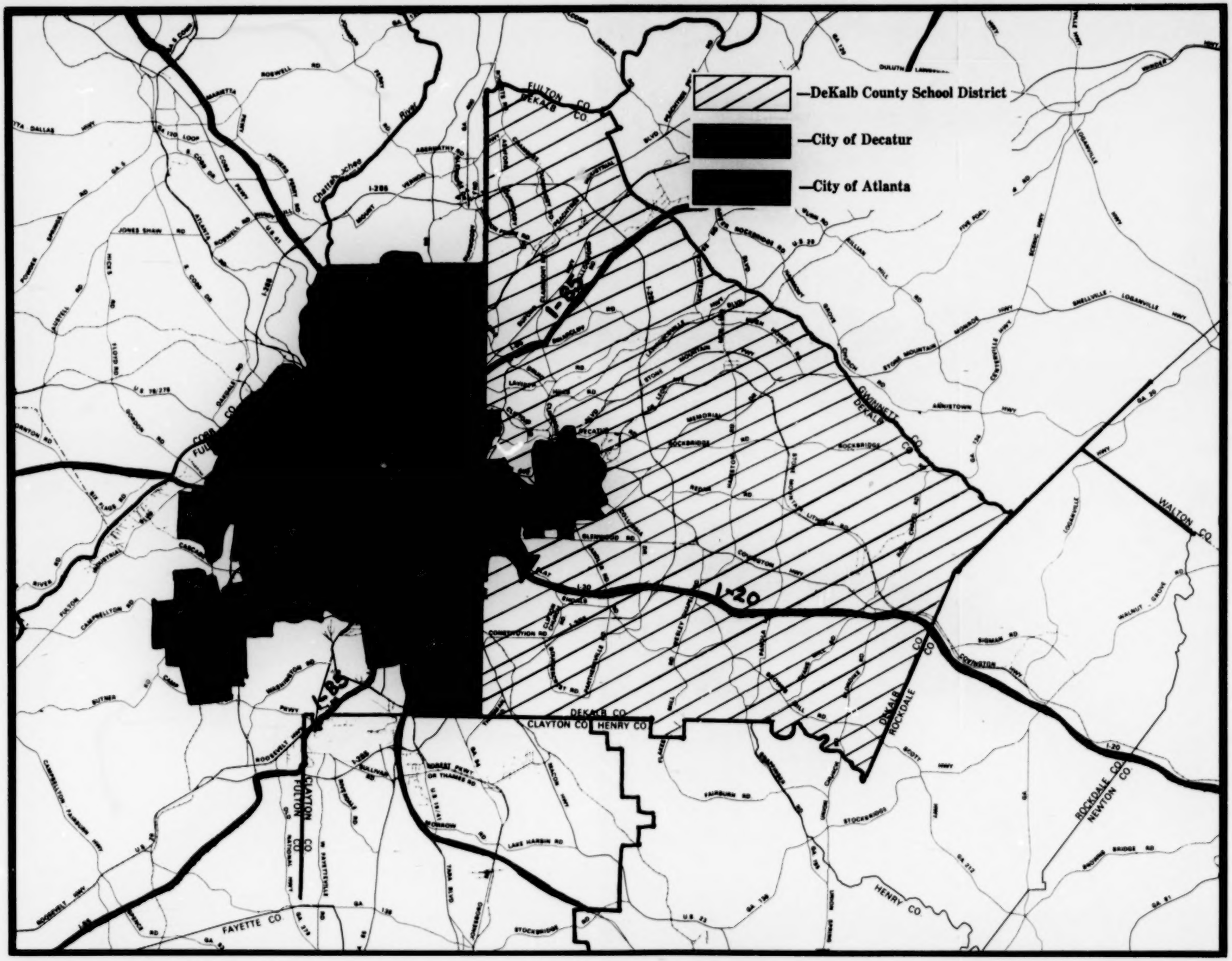
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